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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

JESUS HUMBERTO CANALES,

Defendant and Appellant.

B262949

(Los Angeles County  
Super. Ct. No. MA042795)

APPEAL from a judgment of the Superior Court of Los Angeles County, Eric P. Harmon, Judge. Affirmed with directions.

Gail Harper, under appointment of the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, and Timothy M. Weiner, Deputy Attorney General, for Plaintiff and Respondent.

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A jury convicted Jesus Humberto Canales of first degree murder and four counts of child abuse. In this appeal, Canales argues that the evidence was insufficient to support his first degree murder conviction, and a jury instruction misstated the requirements for a conviction of first degree murder. We remand to the trial court to calculate Canales's presentence custody credit and to amend the abstract of judgment, and we otherwise affirm.

### **BACKGROUND**

An information filed May 29, 2014 charged Canales with the July 12, 2008 murder of Lucy P.<sup>1</sup> in violation of Penal Code section 187, subdivision (a),<sup>2</sup> alleged that Canales personally used a deadly and dangerous weapon (a sword) in violation of section 12022, subdivision (b)(1), and also charged four counts of felony child abuse in violation of section 273a, subdivision (a). Canales pleaded not guilty. After five days of testimony during which Canales testified in his own defense, a jury convicted Canales on all counts and found true the deadly weapon allegation. The trial court sentenced Canales to an indeterminate term of 36 years to life. Canales appealed.

Trial testimony in the prosecution's case established that at the time of the murder in 2008, Canales and Lucy lived in an apartment with their four children, Marina (age nine), Zachary (age seven),<sup>3</sup> Angel (age two), and George (age nine months). Around midnight the night before the murder, Lucy and the four children came home from Lucy's mother's house, and Lucy put the children to bed. At around 2:00 a.m., Marina and Zachary woke up to the sounds of Canales and Lucy arguing about rent money. They left their shared bedroom and went to the door of Canales's and Lucy's bedroom,

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<sup>1</sup> To protect the minor witnesses who testified at trial, we use the victim's last initial, and hereinafter we use her first name for clarity.

<sup>2</sup> All subsequent statutory references are to the Penal Code.

<sup>3</sup> At the time of the murder, Zachary's name was Jesus, and he was called Junior. His adoptive parents changed his name. After Canales killed Lucy, Marina went to live with her biological father. Both Marina and Zachary testified at Canales's trial, more than six years after Lucy's murder.

where the babies Angel and George were in their cribs.<sup>4</sup> Lucy was standing by the dresser, upset that she couldn't find the rent money; Canales was sitting on the bed. After five minutes of arguing, Lucy left and went into the bathroom, and Canales followed her into the hall, continuing the argument. After a few more minutes, they quieted down, and Marina and Zachary returned to their room and tried to sleep.

Soon Lucy and Canales started yelling about money again, and Marina and Zachary went back out into the hall and then followed them into the bedroom. Lucy had broken Canales's PlayStation and his camera by throwing them on the floor. Zachary and Marina stood in the doorway, and Canales sat on the bed. Lucy grabbed a souvenir bat and threatened to break Canales's car windows. Zachary wrapped his arms around Lucy, and Marina took the bat away, put it in her room, and came back. Lucy had found a shirt with lipstick and perfume on it, and she accused Canales of being with another woman, while she continued to search the dresser drawers for the money.

Canales got off the bed and went to the bedroom door, closing it in Marina's and Zachary's faces, and grabbed the sword from behind the door. Marina pushed the door back open and saw Canales standing on the bed and Lucy on her knees, still searching the dresser. Canales swung the sword back over his head with both hands, the cover flew off, and he held the sword in the air. Lucy looked up, saw the sword, and told Canales he would regret it. Canales swung the sword and hit Lucy in the face. The sword cut her bottom lip and her chin, and left a burn mark on her neck. Lucy fell forward. Canales then pulled the sword back up and holding it in front of him with both fists, stuck it in Lucy's back. He jumped off the bed and left the room while Marina went screaming into the hall. Canales grabbed something from the hall closet, shoved Marina over the living room couch, and walked out. From the balcony, Marina saw him walk down the stairs and leave in his car. She went back inside, and Zachary handed her the sword. He had called 911, and Marina spoke to the operator.

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<sup>4</sup> Zachary testified that at some point during the argument, Marina took the babies out of the bedroom and into the living room.

The jury heard a recording of the 911 call. Marina told the dispatcher “my dad just stabbed my mom,” and “[m]y mom’s just leaning against the bed. He stabbed her with his sword.” She gave the dispatcher Canales’s name, described his clothing and his car, and said, “he’s leaving right now.” She said, “[m]y brother has the sword right in his hand,” called for her mother, and said, “Please just hurry up. I don’t want my mom to die.” Marina told the dispatcher: “We’re having Monica come up and help us.” A male voice asked Marina where her father had gone, the dispatcher told Marina somebody was coming, and she said, “I’m scared.”

Marina took the sword from Zachary and put it on the couch in the living room. Neighbors from downstairs (heard on the 911 recording) took her to a friend’s apartment, where she spoke to Detective Lloyd.

Patrick Dunn, a neighbor, testified that he had heard the shouting match and saw Canales “walking in a very determined manner” to the garage, and then drive quickly away. Dunn heard a girl scream, “He’s stabbed my mom,” and he went over to the apartment, arriving at the same time as Monica, another neighbor. He saw a bent and bloody sword on the living room sofa, and a distraught small girl and a small boy standing in the hallway. The girl said her mother was in the back room, and when he entered the bedroom, Dunn saw Lucy hunched over and rocking in the corner. Dunn went back out to check on the children. Monica stayed with Lucy to comfort her, but came out right away to say, “I think she died.” The paramedics arrived shortly thereafter.

A Los Angeles County Sheriff’s deputy who responded to the scene saw Lucy lying face down in the back bedroom, with another woman holding a towel to her back to soak up blood. The deputy checked Lucy’s pulse and found nothing. The paramedics arrived and pronounced her dead. The apartment was clean and tidy, except for a sword lying on the couch.

Deputy Kevin Lloyd, the homicide investigator, arrived at the apartment at around 5:00 a.m. He found Lucy’s body slumped down and sitting on the back of her calves with her head on the bed frame and blood on the bed. There were two wounds on her back and a large gash on her lip and chin. A camera lay underneath her body. The

autopsy showed that Lucy had two stab wounds. One was a chest wound that went all the way through her body and exited at her lower back. The other wound was in the middle of her back. Lucy also had cuts on her hands and fingers, which Detective Lloyd characterized as defensive wounds.

Detective Lloyd interviewed Marina and Zachary. A search for Canales revealed that he had fled to Pomona, where his father helped him get to New Mexico, and from there Canales went to Juarez, in Mexico. After gathering over a thousand tips (including after the case appeared on “America’s Most Wanted”) and interviewing relatives, Deputy Lloyd learned Canales was hiding in a small village in Jalisco. Canales, who was a citizen of El Salvador, was deported by the Mexican immigration authorities, flown to the United States, and arrested when he arrived at the Los Angeles airport in 2013, more than five years after Lucy’s fatal stabbing in 2008.

In an interview on November 16, 2013, after he received advisement of his rights under *Miranda v. Arizona* (1966) 384 U.S. 436, Canales admitted he had hit Lucy with the sword and then stabbed her twice. Canales claimed an addiction to methamphetamine, and said he often smoked the drug more than three times a day. He had been smoking methamphetamine the day before the stabbing, and had not slept for two nights. Canales had come home to sleep, and while he was lying in bed, at around 1:00 a.m., Lucy came home from her mother’s house with the children. Lucy was drunk and started to argue with Canales. She began rifling through the dresser looking for money she had hidden in one of the children’s socks, swearing at Canales and saying he had taken the money. The children were screaming while their parents argued. Lucy telephoned her mother and said, “you better come save this motherfucker or else I’m gonna . . . or else I’m gonna kill him.” She went and got a wooden bat they kept behind the door and swung it at Canales, hitting him in the ribs and then aiming for his head but hitting his shoulder. Canales said he was under the influence and “didn’t know what [he] was doing” when he got the sword from behind the door. He swung it like a baseball bat at Lucy, hitting her neck. Canales then jumped on the bed, stabbed her in the chest, and

pulled the sword out. Lucy fell to her knees and he stabbed her again in the back. He didn't know whether the children were watching.

Leaving the sword in Lucy, Canales ran out of the bedroom. While Marina called 911, he grabbed his keys and some money, and drove off in his van. Canales called his sister from his cell phone and told her "I think . . . I killed Lucy," and said he was going to kill himself. Once in Pomona, Canales told his friends, "I think . . . I killed her and . . . I didn't know what I was doing." He left for New Mexico, and then crossed the border into Mexico.

Canales admitted he had punched holes in the hallway wall when he was angry. Years earlier, Lucy told him that she slept with another man. Canales said "what set me off" the day he stabbed Lucy was what she said to her mother, and when she picked up the bat. Zachary and Marina both testified that they never saw Lucy hit Canales, including with the baseball bat on the night of her murder.

Canales had found the sword in a house they had rented in Palmdale, and kept it because it was "neat." He used to keep the sword on top of the refrigerator. The sword was about 28 inches long, and both sides of the blade were sharpened. Marina and Zachary had seen Canales sharpening the sword in the kitchen and in the bathroom, using an industrial knife sharpener. Once, when Lucy saw him sharpening the sword, she said, "[W]hat, are you going to try to kill me again?" On an earlier occasion, Canales was mad at Zachary for playing a video game, which made Lucy angry: Lucy had said "if [I] could kill [Canales], [I] would." Canales got the sword and approached Lucy, who was breastfeeding the baby on the living room couch. Lucy yelled for Marina and Zachary, who ran into the living room and saw the sword case under the couch. After that incident, Canales kept the sword in his bedroom closet.

The coroner testified that Lucy had alcohol and marijuana in her system. The first stab wound entered the top of her chest and exited her lower back. The second stab wound entered the middle of Lucy's back, and was 10 inches deep. Lucy had cuts on both her lips, four abrasions on her neck, and cuts on her right thumb.

The defense presented witnesses to support the argument that when Canales killed Lucy, he was defending himself in a heat of passion. Lucy's mother testified that Lucy and Canales fought and argued for a few days before the stabbing, and Lucy had brought the children over to her mother's house for dinner each night. On the night of the stabbing, Lucy drank two beers with dinner, but she was not impaired. After she returned home with the children, Lucy called her mother at about 1:30 a.m. without using profanity to complain that, Canales had taken her rent money. Lucy's mother told Lucy not to argue with Canales, and that she would get Lucy's father and come over. The parties stipulated that Lucy's mother told deputies that during the phone call she counseled Lucy to calm down and the defendant would return the money when he had some. When Lucy's brother called Lucy back, he learned Lucy was dead.

A woman who had worked with Canales testified that in 2004, Lucy came to the workplace and asked her if she was seeing Canales; when she answered yes, Lucy hit her. The woman never saw Lucy again.

Canales testified that after Zachary's birth, he and Lucy separated because of financial problems, her infidelity, and his methamphetamine use. They reunited but began having the same problems after a couple of months. Once when Lucy had been drinking, she slapped him outside a friend's house. Another time, the police were called when Lucy fought with her brother. When the couple lived with her parents, Lucy made him move out. Later, Lucy's mother called and asked him to take Zachary because Lucy was neglecting him. After a while they reunited again, but the same arguments ensued; Lucy continued to drink a lot. Lucy frequently accused him of cheating, and sometimes she would kick him out of the house. His sister told him she saw another man going into the apartment. Sometimes Lucy would disappear for a few hours: he thought she was cheating on him.

On the day he stabbed Lucy, Canales had been up for two or three days smoking methamphetamine, and he just wanted to rest. When Lucy came home with the children, he asked her where she had been, and she replied, "[D]on't fucking worry about it." He thought she had been out with other men. Lucy asked him for money to buy beer, he

refused, and then the argument started. Lucy began to rifle through the drawers looking for money she had hidden in a child's sock, and accused Canales of taking it. She called her mother and threatened to kill Canales if he didn't return the money, then came back into the room and retrieved the bat from behind the door. She swung at him and hit his ribs, and then he blocked a swing at his head. When she threatened to break the windows in his van and made a move toward the drawer where he kept his knives,<sup>5</sup> he got up, went to get the sword, and stabbed Lucy. "Everything happened real quick." Canales felt scared: the methamphetamine made him not know what he was doing, and he overreacted. Canales felt upset over Lucy's infidelities and did not intend to kill her; he "just exploded." He admitted "it's not a self defense." He panicked and left, even though the sword was still in Lucy's body and the children remained in the apartment.

Canales's sister testified that Lucy was an alcoholic. In 2005, when Lucy and Canales separated for six months, Canales's sister saw a man headed toward Lucy's apartment. When he observed Canales's sister, the man walked back to his car and waited until she left. Lucy and Canales argued regularly over infidelity.

In closing, the prosecution argued that the evidence proved Canales was guilty of first degree murder. When Canales got up off the bed he intended to kill Lucy, and when he went to the door and got the sword, he had ample time for premeditation and deliberation.<sup>6</sup> The defense argued that Canales acted rashly and impulsively after Lucy threatened him, responding to provocation and in the heat of passion. The facts did not show premeditation or deliberation, or time for a well-considered decision. Canales was guilty only of voluntary manslaughter, or of killing Lucy in self-defense or imperfect self-defense.

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<sup>5</sup> There was no testimony that the detectives found the knives Canales mentioned.

<sup>6</sup> The prosecutor argued that Canales endangered the children and committed child abuse by inflicting pain and mental suffering by using a deadly weapon in the children's presence, and by leaving the four children alone and unattended as Lucy died, while Canales fled.



## DISCUSSION

Canales argues that insufficient evidence supported a finding of the premeditation and deliberation required for his conviction of first degree murder. He also argues that a jury instruction misstated the law's definition of premeditation. Finally, respondent concedes that the trial court should have calculated and awarded credit to Canales for his presentence custody. We agree that we must remand the case for a calculation of presentence custody credit; we otherwise affirm the judgment.

### **I. Substantial evidence supported the jury's verdict of first degree murder.**

Sufficient evidence supports Canales's conviction if we conclude that "a reasonable trier of fact could have found the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 576.) We review the entire record, viewing the evidence in the light most favorable to the respondent, to determine whether the jury verdict is supported by evidence which is "reasonable in nature, credible, and of solid value." (*Id.* at pp. 576–577.) "If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] A reviewing court neither reweighs evidence nor reevaluates a witness's credibility." (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.) "Our task is not to determine, for example, whether the *weight* of the evidence might favor second degree murder over first degree murder . . . . Our task is to determine whether there was *sufficient* evidence by which a rational jury could decide that [the victim was] the object[] of first degree murder." (*People v. Nazeri* (2010) 187 Cal.App.4th 1101, 1111.) "Even if we might have made contrary factual findings or drawn different inferences, we are not permitted to reverse the judgment if the circumstances reasonably justify those found by the jury." (*People v. Perez* (1992) 2 Cal.4th 1117, 1126.)

"There is no question that [defendant] was the perpetrator. The only question is the circumstances under which the murder occurred—that is, whether it was premeditated and deliberate." (*People v. Perez, supra*, 2 Cal.4th at pp. 1120–1121.) First degree murder is "willful, deliberate, and premeditated killing . . . . All other kinds of murders

are of the second degree.” (§ 189; *People v. Anderson* (1968) 70 Cal.2d 15, 25.) While malice aforethought is an essential element of both first and second degree murder, premeditation and deliberation require “‘*substantially more reflection* than may be involved in the mere formation of a specific intent to kill.’” (*People v. Boatman* (2013) 221 Cal.App.4th 1253, 1264.) There must be evidence that the defendant “‘thought about or considered the act beforehand,’” so that the intentional killing “‘“occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse.”’” (*Ibid.*) Premeditation and deliberation do not require an extended period of time: “‘The true test is not the duration of time as much as it is the extent of the reflection.’ [Citations.] We have observed that ‘thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly.’” (*People v. Solomon* (2010) 49 Cal.4th 792, 813.)

Circumstantial evidence can be sufficient to show premeditation and deliberation, although the brutality of the killing alone is not enough. (*People v. Anderson, supra*, 70 Cal.2d at pp. 24–25.) The defendant must have killed “‘“as a result of careful thought and weighing of considerations; as a *deliberate* judgment or plan; carried on coolly and steadily, [especially] according to a *preconceived design*.’” (*Id.* at p. 26.) The briefs in this case focus on three categories of evidence which can suffice to sustain a finding of premeditation and deliberation: “The first category includes facts which show planning activity prior to the actual killing. Category two includes facts about the defendant’s prior relationship or conduct with the victim from which the trier of fact could infer motive. Category three consists of facts about the manner of the killing from which the trier of fact could infer that the manner of killing was so particular and exacting as to be accomplished according to a preconceived design.” (*People v. Wells* (1988) 199 Cal.App.3d 535, 539; *Anderson*, at pp. 26–27.) The evidence is sufficient if all three categories are present, there is extremely strong evidence of the first, or there is evidence of the second category in conjunction with either of the other categories. (*Anderson*, at p. 27.) Our Supreme Court has cautioned that these categories are only one set of guidelines for reviewing the sufficiency of evidence of premeditation and deliberation:

they “are descriptive and neither normative nor exhaustive, and the reviewing courts need not accord them any particular weight.” (*People v. Halvorsen* (2007) 42 Cal.4th 379, 420.)

Canales sharpened both sides of the sword, once causing Lucy to ask, “are you going to try to kill me again?” The children testified he had threatened Lucy with it at least once before, when he kept it on top of the refrigerator. At the time of the murder, he stored the sword within easy reach behind the bedroom door. All this evidence supports an inference of long-term planning activity and targeting of Lucy. On the night of the murder, they argued for a lengthy period, and at one point Canales followed Lucy out into the hall to continue arguing. After the argument resumed in the bedroom, Canales got up from the bed, walked to the door, closed it in the children’s faces, and retrieved the sword. He returned to the bed, stood on it (a superior vantage point), slashed the sword down at Lucy’s face, lifted it back up, changed his grip, and stabbed her twice. This is additional evidence of planning activity. The sequence of events supports a finding that Canales “formed a clear intent to kill, at the latest, during the altercation with [the victim], and obtained [the weapon] to carry out that plan.” (*People v. Sanchez* (1995) 12 Cal.4th 1, 34, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) Although the sword was a short distance away, “planning activity occurring over a short period of time is sufficient to find premeditation” (*Sanchez*, at p. 34), and Canales could form the intent to kill without having to travel far to obtain the deadly weapon. With Canales looming above her, Lucy warned Canales that he would regret it, giving him additional time to make the “cold, calculated judgment” to strike her face and then lift the sword above his head and stab her in the chest and back. (*People v. Solomon, supra*, 49 Cal.4th at p. 813.) Canales testified that he was under the influence of methamphetamine and didn’t know what he was doing when he retrieved the sword and killed Lucy, but the jury was entitled not to believe his testimony.

As for motive, testimony established that Canales and Lucy had been arguing for days, and Lucy had been escaping by taking the children with her to eat dinner at her mother’s house. Canales and Lucy each suspected the other of infidelity, and just before

Canales killed Lucy they were arguing about money and her discovery of his shirt smelling of perfume. Evidence about Canales's prior relationship with Lucy, including jealousy, and the circumstances under which he killed her are evidence from which a jury could infer motive. (*People v. Martinez* (1987) 193 Cal.App.3d 364, 371.) Their longstanding conflict and deteriorating relationship support the conclusion that Canales had a motive to kill Lucy. (*People v. Nazeri, supra*, 187 Cal.App.4th at p. 1117 ["abundance of motives," including sexual jealousy, supported finding of premeditation and deliberation].)

The manner of the killing also provides evidence of premeditation. Lucy died of a stab wound that impaled her body from front to back, and from a second stab wound 10 inches deep into her back. When the victim died of two gunshot wounds to the head and abdomen, our Supreme Court wrote: "Wounds of this nature, as a result of shots fired from point-blank range, evince a calculated and deliberate design to kill, not an indiscriminate shooting in the heat of passion. . . . The fact that defendant shot the victim twice from close range could reasonably support an inference by the jury that the manner of killing was "particular and exacting." ( *People v. Morris* (1988) 46 Cal.3d 1, 23, disapproved on other grounds in *In re Sassounian* (1995) 9 Cal.4th 535, 543, fn. 5.) Here, the two stab wounds inflicted from above are consistent with a deliberate slaying rather than an indiscriminate frenzy, and evince a calculated and deliberate design to kill.

Canales relies heavily on *People v. Boatman, supra*, 221 Cal.App.4th 1253, 1257, in which the appellate court concluded insufficient evidence supported premeditation and deliberation, and reduced a conviction of first degree murder to second-degree murder. The record in that case "lacked any planning evidence whatsoever." (*Id.* at p. 1267.) The defendant shot his girlfriend in the face, but there was no evidence that he "even moved from his squatting position on the floor" to get the gun, which he had taken away from her just before the shooting. (*Ibid.*) His "behavior following the shooting is of someone horrified and distraught about what he had done, not someone who had just fulfilled a preconceived plan" and "strongly suggests a lack of a plan to kill," including trying to resuscitate the victim, telling his brother to call the police, crying as heard in the

background of the 911 call, urging the police to call an ambulance, and crying on the way to the police station and asking how he could go on with his life. (*Ibid.*) The record contained “little or no relevant motive evidence.” (*Ibid.*) The fight preceding the killing was consistent only with a hasty and unconsidered impulse to shoot. And although he shot the victim in the face, this supported only a finding of malice, not a preconceived design to take her life. (*Id.* at p. 1268.)

The evidence in this case of planning, motive, and manner of killing is much stronger, as we explain above. Further, Canales’s behavior after he stabbed Lucy was not consistent with horror, emotion, or remorse, and does not suggest a lack of a plan to kill. He immediately jumped off the bed and left the bedroom, pausing only to take his wallet out of the hall closet and push Marina onto the couch. Canales then left the house, walked determinedly to his car, and drove away, leaving the children in the apartment to call 911, pull the sword out of Lucy’s back, and deal with the sheriff and paramedics. He drove to Pomona, went to New Mexico, and then crossed the border into Mexico, where he hid for five years.

The trial court instructed the jury on self-defense, second degree murder, first degree murder, voluntary heat-of-passion manslaughter, and imperfect self-defense. The court also instructed the jury that voluntary intoxication was relevant to whether Canales acted with premeditation and deliberation. The jury found Canales guilty of first degree murder. “If a rational jury *could* have come to the conclusion that [Lucy’s murder was] willful, deliberate, and premeditated, then we must affirm even if, had we been members of the jury, we would not have so concluded.” (*People v. Nazeri, supra*, 187 Cal.App.4th at p. 1111.) Sufficient evidence supported the jury’s verdict of first degree murder.

## **II. The trial court did not err in giving CALCRIM No. 521.**

At Canales’s request, the trial court instructed the jury on first degree murder using CALCRIM No. 521. On appeal, Canales claims one sentence from the instruction he requested misstated the law of premeditation and requires reversal of his conviction and a new trial. We consider this issue in spite of defense counsel’s failure to object during trial, as “[i]f the trial court provided misleading instructions to the jury, this error

would affect the defendant's substantial rights.” (*People v. Hernandez* (2010) 183 Cal.App.4th 1327, 1331, fn. 2.)

CALCRIM No. 521, as given to the jury, reads as follows: “The defendant is guilty of first degree murder if the People have proved that he acted willfully, deliberately, and with premeditation. The defendant acted *willfully* if he intended to kill. The defendant acted *deliberately* if he carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill. **The defendant acted with premeditation if he decided to kill before completing the act that caused death.**

[¶] The length of time the person spends considering whether to kill does not alone determine whether the killing is deliberate and premeditated. The amount of time required for deliberation and premeditation may vary from person to person and according to the circumstances. A decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated. On the other hand, a cold, calculated decision to kill can be reached quickly. The test is the extent of the reflection, not the length of time.” (Boldface added.) Canales asserts that the boldfaced sentence does not communicate that premeditation requires more reflection than just the formation of an intent to kill, and thus effectively omits the requirement that the defendant have thought over the course of action in advance.

The instruction is a correct statement of the law. A defendant could make a premeditated decision to kill during the course of an attack. In *People v. Ainsworth* (1988) 45 Cal.3d 984, the California Supreme Court upheld a jury's finding of premeditated and deliberate murder “based on the theory that defendant knowingly and intentionally permitted the victim to bleed to death as he kept her captive during the lengthy car ride after the shooting.” (*Id.* at p. 1023.) The California Supreme Court reached a similar conclusion in *People v. Raley* (1992) 2 Cal.4th 870, finding sufficient evidence to support the jury's finding of premeditation and deliberation: “Even if we were to agree that it could only be concluded that the many stab wounds defendant inflicted on each woman were part of an unreflective explosion of violence, his calculated decision to let them bleed for the next 18 hours, to refuse medical attention, to beat them

about the head and to dump them on a winter night into an isolated ravine supports the conclusion that he premeditated the death of [the murder victim].” (*Id.* at p. 888.) The cases provide support for the “before completing” language of CALCRIM No. 521. Thus, the instruction was legally correct, and it was incumbent upon defendant to request the trial court use different language when reading the instruction to the jury. (See *People v. Hudson* (2006) 38 Cal.4th 1002, 1011–1012.)

We consider the instructions as a whole, assuming the jury is capable of understanding and correlating all the instructions given. (*People v. Hernandez, supra*, 183 Cal.App.4th at p. 1332.) The immediately preceding instruction explained that murder required malice aforethought and was second degree unless proven to be first degree. The jury knew from the challenged instruction on first degree murder that Canales acted willfully if he intended to kill, and that in addition to intending to kill, Canales must have premeditated *and* deliberated, carefully weighing the considerations and the consequences before deciding to kill. The instruction also informed the jury that while the length of time is not dispositive, a rash or impulsive decision is not deliberate and premeditated. CALCRIM No. 521 as a whole clarified that premeditation was not synonymous with intent, and the trial court did not err in giving it to the jury.

### **III. The trial court must calculate presentence custody credit on remand and amend the abstract of judgment.**

Canales argues, and respondent agrees, that the trial court erred by failing to calculate and award to Canales custody credit for the time Canales served before sentencing. Section 2900.5 entitles a defendant to presentence custody credit, beginning on the day of arrest and continuing through the day of sentencing. (*People v. Rajanayagam* (2012) 211 Cal.App.4th 42, 48.) We therefore remand for calculation of presentence custody credits and correction of the abstract of judgment. (*People v. Kunath* (2012) 203 Cal.App.4th 906, 911.)

The trial court imposed fines and fees not appearing on the abstract of judgment. The abstract must also be corrected to reflect the fines and fees imposed.

### **DISPOSITION**

Jesus Humberto Canales's sentence is vacated and the matter is remanded for resentencing for the trial court to calculate presentence custody credit under Penal Code section 2900.5. The judgment shall be modified to reflect the presentence custody credit. The superior court is directed to prepare an amended abstract of judgment reflecting this modification and also reflecting the fines and fees previously imposed. The judgment is otherwise affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

CHANEY, Acting P. J.

LUI, J.